No. 10380

In the United States Circuit Court of Appeals for the Ninth Circuit

CARSON AND TAHOE LUMBER AND FLUMING CO., A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Summary of argument	11
Argument:	
The finding of the Board of Tax Appeals that the land sold by the taxpayer in 1938 had a value on March 1, 1913, of $75,000 is supported by the evidence	12
Conclusion	20

CITATIONS

Cases:	
Andrews v. *Commissioner*, 135 F. 2d 314	14
Belridge Oil Co. v. *Commissioner*, 85 F. 2d 762	14
Chicago Ry. Equipment Co. v. *Blair*, 20 F. 2d 10	14
Chicago Railway Equipment Co. v. *Commissioner*, 13 B. T. A. 471, modified, 39 F. 2d 378, reversed, 282 U. S. 295	15
Colorado Bank v. *Commissioner*, 305 U. S. 23	13
Commissioner v. *Marshall*, 125 F. 2d 943	15
Commissioner v. *Ray*, 88 F. 891, certiorari denied, 301 U. S. 711	19
Del Vecchio v. *Bowers*, 296 U. S. 280	16
Doric Apartment Co. v. *Commissioner*, 94 F. 2d 895	18
Elmhurst Cemetery Co. v. *Commissioner*, 300 U. S. 37	13
Helvering v. *Edison Securities Corp.*, 78 F. 2d 85	19
Helvering v. *Kehoe*, 309 U. S. 277	13
Helvering v. *Kendrick Coal & Dock Co.*, 72 F. 2d 330, certiorari denied, 294 U. S. 716	15
Helvering v. *Nat. Grocery Co.*, 304 U. S. 282	13
Helvering v. *Rankin*, 295 U. S. 123	13
Helvering v. *Safe Deposit Co.*, 316 U. S. 56	15
Houghton v. *Commissioner*, 71 F. 2d 656, certiorari denied, 293 U. S. 608	15
Kitrell v. *United States*, 79 F. 2d 259, certiorari denied, 296 U. S. 643	15
Nachod & United States Signal Co. v. *Helvering*, 74 F. 2d 164	14
Palmer v. *Commissioner*, 302 U. S. 63	13
Whitlow v. *Commissioner*, 82 F. 2d 569	18
Statute:	
Revenue Act of 1938, c. 289, 52 Stat. 447:	
Section 111	2
Section 112	3
Section 113	3
Miscellaneous:	
10 Mertens, Law of Federal Income Taxation, c. 59	15

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OPINION BELOW

The only previous opinion in this case is the unreported memorandum findings of fact and opinion of the Board of Tax Appeals which is printed in the record at pages 25 to 38, inclusive.

JURISDICTION

This proceeding involves a deficiency in federal income tax asserted against Carson and Tahoe Lumber and Fluming Company for the taxable year 1938. On April 11, 1940, the Commissioner of Internal Revenue mailed a statutory notice of deficiency to Carson and Tahoe Lumber and Fluming Company (hereafter sometimes called the taxpayer), pursuant to Section 272 of the Revenue Act of 1938, c. 289, 52 Stat. 447, proposing to assess a deficiency in income tax against it for the taxable year 1938 in the sum of $4,844.10. (R. 11–15.) On July 8,

1940, the taxpayer filed with the Board of Tax Appeals, pursuant to Section 272 of the 1938 Act, a petition for redetermination of its income tax liability for the year involved. R. 1, 5–15.) The Commissioner of Internal Revenue thereafter filed an amended answer to the taxpayer's petition in which he prayed that the deficiency asserted by him for 1938 be increased by the Board of Tax Appeals to $17,963.61. (R. 17–22.) The proceeding was heard by the Board of Tax Appeals in due course, and after hearing and consideration the Board, on September 1, 1942, entered its decision redetermining a deficiency in the taxpayer's 1938 income tax liability in the sum of $15,488.61. (R. 38–39.) On November 27, 1942, the taxpayer filed with The Tax Court of the United States (formerly the United States Board of Tax Appeals) a petition, pursuant to Sections 1141 and 1142 of the Internal Revenue Code, for review by this Court of the decision entered by the Board of Tax Appeals. (R. 39–47.)

As of October 22, 1942, by Section 504 of the Revenue Act of 1942, c. 619, 56 Stat. 798, the name of the Board of Tax Appeals was changed to The Tax Court of the United States. Although the decision of the Board in this case was entered prior to that date, since the record on review was prepared subsequent thereto by the Clerk of that tribunal he captioned it "Upon Petition to Review a Decision of the Tax Court of the United States."

QUESTION PRESENTED

Whether the finding of the Board of Tax Appeals that 11,187 acres of land sold by the taxpayer in the year 1938 had a fair market value of $75,000 on March 1, 1913, is supported by the evidence.

STATUTE INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

> SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF GAIN OR LOSS.
>
> (a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the

loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(14) *Property acquired before March 1, 1913.*—In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subsection, adjusted (for the period prior to March 1, 1913) as provided in subsection (b), is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

* * * * *

STATEMENT

This is an appeal from a decision of the United States Board of Tax Appeals (now The Tax Court of the United States) holding that the taxpayer is liable for $15,488.61 additional federal income tax for the year 1938. (R. 38–39.) The only question involved is the amount of gain which the taxpayer realized in that year upon the sale of 11,187 acres of land, and this in turn depends upon a determination of the fair market value of the land in question on March 1, 1913. (R. 26, 44–46.)

The land in question is located along or near the eastern shore of Lake Tahoe, Douglas County, Nevada. It was sold, together with improvements, for a total consideration of $300,433.27 (which included $433.27 for unexpired insurance). In reporting the sale in its 1938 income tax return the taxpayer used a March 1, 1913, value of $185,442.25, which included improvements costing $30,428.25 which are not in dispute. (R. 26.) In auditing the taxpayer's return the Commissioner of Internal Revenue reduced the March 1, 1913, value of the land by $15.501.85 which, with other adjustments not in dispute, resulted in the determination of a deficiency of $4,844.10. (R. 11–15, 26.) Before the case was tried the Commissioner filed an amended answer with the Board of Tax Appeals in which he affirmatively alleged that the March 1, 1913, value of the land sold by the taxpayer in 1938 was not in excess of $60,000 and prayed that the deficiency be therefore increased to $17,963.61. (R. 17–22.)

The case was submitted to the Board of Tax Appeals on a voluminous record consisting of the testimony of a number of witnesses produced by each party plus numerous documents introduced as exhibits.[1] In its findings of fact (R. 26–36) the Board reviewed the evidence in some detail and on the basis of all of the evidence the Board found as an ultimate fact that the land sold by the taxpayer in 1938 had a fair market value of $75,000 on March 1, 1913 (R. 36). On the basis of this finding, the Board entered its decision redetermining a deficiency in tax of $15,488.61 for the year 1938. (R. 38–39.)

[1] Many of the documentary exhibits were, by order of this Circuit (R. 353–354), omitted from the printed record on review, but the originals are to be on file with this Court when the case is argued.

The taxpayer, a corporation, was organized in 1873 and exchanged its capital stock for certain timber lands located in the States of Nevada and California on and near Lake Tahoe. It carried on a lumber and sawmill business until about 1896, when practically all of the merchantable timber had been removed from its lands and the lumbering operations were discontinued. After 1898 land was the only asset the corporation had. In 1907 the capitalization of the corporation was reduced from $2,080,000 to $260,000. (R. 26–27.)

In 1912 and 1913 the taxpayer owned approximately 44,000 acres of land in Nevada and California, all of it around Lake Tahoe, with about 75,000 shore feet on the lake. Nearly all of the land lying on the Nevada side had lake frontage. The land sold in 1938 which is involved in this proceeding was all located on the east side of Lake Tahoe in the State of Nevada.[2] (R. 27.)

In 1913 there was very little development on the Nevada side of Lake Tahoe. There was no road of any kind from Glenbrook, Nevada, north to the California line until 1926, when the United States Forestry Service put in a narrow road. The road from the Nevada state line on the South northwards to Glenbrook, by way of Zephr Cove, was poor. In 1912 and 1913 it was of sand and gravel, suitable only for horse-drawn vehicles. Even in 1928 it was rough, wide enough only for one vehicle, and had sharp curves and poor distance visibility. The Nevada side of the lake was therefore not easily accessible in 1913. A railroad had been extended to Tahoe City on the California side of the lake in 1902 or 1903, and development near there was fairly well advanced by 1912, although at that time the railroad was narrow gauged. (R. 27.)

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[2] The location of the lands owned by the taxpayer in 1912 and 1913 is shown in detail in taxpayer's Exhibit 8. The acreage and shore feet of the several tracts designated by numbers 1 to 22, inclusive, on Exhibit 8 are tabulated in the record at page 77. The dates of disposition of all lands disposed of from these several tracts, including the acreage involved in this controversy sold to George Whittell in 1938, and the consideration received for such lands as were sold, are shown in taxpayer's Exhibit 15. (R. 100–105.) The location of the lands sold to George Whittell in 1938 is shown in taxpayer's Exhibit 17 and respondent's Exhibit "L".

The topography of the Nevada side of Lake Tahoe was not as well suited for recreational purposes as that on the California side. The northwest and south sides of the lake, which are in California, have relatively flat land extending back from the lake shore in all but a few cases from a quarter of a mile to two miles, and at the south end from six to eight miles. The east, or Nevada, side of the lake has very little flat land except at two or three places. The climatic conditions are less favorable on the east side because of prevailing winds from the West and there is less precipitation on the east side. (R. 28.)

The Board found from the evidence that that portion of the taxpayer's land on the Nevada side of Lake Tahoe, which adjoined the lake, cannot be said to have had any special value in 1913 because of its lake frontage, except as far as a half mile back from the lake in most portions and three-quarters of a mile in a few. (R. 28.)

The Board also found from the evidence that about 1916 waterfront property on the west, or California, side of Lake Tahoe near Tahoe City was selling for from five to ten times as much as that on the east side of the lake. (R. 28.)

In 1912 the taxpayer gave an option to J. B. Brewster, L. B. Edwards and C. M. Wooster to purchase 44,403 acres of land belonging to it and to El Dorado Wood and Flume Company for a total price of $778,500. The option agreement was to last for five years but only on condition that the holders of the option would purchase 10 per cent of the property the first year, 20 per cent the second, 20 per cent the third, 20 per cent the fourth, and 30 per cent the fifth. At the end of the first year no purchases had been made pursuant to the option and the holders thereof asked for an extension of the time. The taxpayer in 1913 extended it for one month, but no purchases having been made, it was cancelled. The prices named in the option agreement represented those which W. S. Bliss, its then president, felt in 1912 would be realized over a period of five years. In 1913 there was a financial depression throughout the country and a consequent reluctance on the part of people having money to make new commitments or investments. In that year and until 1920 there was little demand for the property of the taxpayer. Property values began to

climb slowly until 1920 and after that year more rapidly. (R. 28–29.)

This option agreement was executed because of the desire of the stockholders and trustees of the taxpayer to liquidate its property which was producing hardly enough income to pay its expenses. After the cancellation of the option certain stockholders urged the sale of property so that some distribution could be made to them. Few sales were made, however, and dissension arose between Bliss and the other officers and trustees. The latter believed that Bliss' ideas concerning the values of the taxpayer's lands were exaggerated, while Bliss believed that the prices at which the other officers were proposing to sell the land were too low. Finally, in 1928, after some litigation, Bliss resigned as an officer and trustee of the taxpayer and surrendered his stock in return for the conveyance to him of certain property. (R. 29.)[3]

During the period from 1903 to 1923 several sales were made of property located on the east, or Nevada, side of Lake Tahoe. The details of these sales are set out in the Board's findings. (R. 29–30.) The findings show that, with a few exceptions involving sales of small tracts of shore property, the price at which these sales were made was comparatively low.

The record also contains evidence of a number of sales of property in the State of California located on the south, west, and northwest sides of Lake Tahoe, over a period of some thirty-five years. However, the Board made no findings with respect to these sales, explaining in its opinion that it limited its findings to the sales on the east side of the lake because it felt that on account of the difference in conditions outlined in its findings of fact the sales of property on the west side of the lake were of little help in ascertaining the fair market value as of March 1, 1913, of the land involved in the present controversy. (R. 37.)

[3] Others of the Bliss family who owned stock in the taxpayer corporation also withdrew and surrendered their stock in exchange for land. The acreage and shore feet distributed to them from the various tracts shown in taxpayer's Exhibit 8 are listed in taxpayer's Exhibit 15. (R. 100–105.)

In 1910 appraisals were made of two tracts of land on the east side of Lake Tahoe, in Nevada, one consisting of 80 acres located ¼ mile from shore near Glenbrook and one consisting of 227½ acres with shore front on Zephr Cove, in connection with the settlement of the estate of Duane Leroy Bliss, the deceased owner. The 80-acre tract was appraised at $.50 per acre and the tract with shore frontage was appraised at $2.50 per acre. (R. 31.) In 1921 an appraisal was made of an 80-acre tract on the east side of Lake Tahoe in connection with the settlement of the estate of Elizabeth T. Bliss. This tract was located ¼ mile from the shore near Glenbrook and was appraised at $4 per acre. (R. 31.)

In its federal capital stock tax return for the fiscal year ended June 30, 1916 (Exhibit "B"), the taxpayer reported as the fair market value of the 520 outstanding shares of its capital $104,000 which was computed on the basis of approximately $3 per acre for all of the land then owned by it. The return contains the following note (R. 32, Exhibit "B"):

> This Company is the owner of 35,000 to 40,000 acres of land situate around Lake Tahoe, at an elevation of from 6300 to 9000 feet above sea level, which is rented for grazing purposes at the rate of from 5¢ to 7½¢ per acre per year. This income will not pay expenses.
>
> In the last five years this Company has sold 640 acres, netting about $5.00 per acre. Some of this land might answer for hotel sites, at a higher valuation, but would say as a whole it could not be sold for over $3.00 per acre if at that. Consequently have written in paragraph 8—520 shares at $200.00 per share, equal to $104,000.00.

In its federal income and excess-profits tax return for the calendar year 1918 (Exhibit "I") the taxpayer, in answer to the question "What was the fair value of the total capital stock of the corporation as determined in the last assessment of the capital stock tax?" said "No market value. Assets consist entirely of lands; impossible to make definite estimate." (R. 32, Exhibit "I", p. 6.)

In its original federal capital stock tax returns for the fiscal years 1922, 1923, 1924, and 1925, the taxpayer declared the fair

value of its 520 outstanding shares of capital stock at $102,-949.95, $92,964, $72,123, and $71,066, respectively. (Exhibits "H", "O", "P", and "Q".) These declarations, as the Board correlated them with the taxpayer's admitted acreage for the several years, showed an average value per acre for the respective years as $2.33, $2.19, $1.35, and $1.65. (R. 33.)

In answer to an inquiry from the Commissioner of Internal Revenue of August 5, 1926, with respect to its capital stock tax values for the years 1919 to 1926, inclusive, the taxpayer replied on September 16, 1926, in part, as follows (R. 33–34, Exhibit "M"):

> This Company was originally organized in 1873 to conduct a wood and lumber business, but for the past thirty years or more that portion of its business has been discontinued and it is now but a liquidating company, the limited rentals and other incidental receipts not even paying taxes and operating expenses, and there has been but a limited demand to purchase the property of the company. * * * The truth is—the property is worth just what the company can get for it; there has been but a limited demand for many years and there is a serious question as to whether this liquidating company should pay a Capital Stock Tax, but we wish above all things to be fair, and we are therefore enclosing amended returns for the years 1923, 1924 and 1925 on basis of the capitalized value. We feel that the previous returns have been fair in view of the facts above recited, and should you agree, shall be pleased if you will cancel the enclosed returns; if you feel however, that the latter should be filed, we respectfully request that the returns previous to these be accepted as representative of a fair capitalized value.

The 11,187 acres of land here in question were included in the land valued by the taxpayer in computing its 1916 capital stock tax return at an average value of $3 an acre. It was the opinion of William S. Bliss, president of the corporation, in 1917 that this was the average value of the corporation's land in that year, when he signed the 1916 capital stock tax return. (R. 34.)

On January 29, 1918, at a meeting of a majority of the trustees of the taxpayer, there was adopted the following resolution, which was approved by W. S. Bliss, as president (R. 34, Exhibit 13):

> Resolved: The Carson & Tahoe Lumber & Fluming Co., represented by its duly qualified and acting officers, desiring to comply with the United States Income Tax Law, in order to arrive at the value of the Company's property as of March 1st, 1913, does hereby fix as the actual value of its real estate holdings located in Washoe, Ormsby and Douglas Counties, Nevada, and El Dorado and Placer Counties, California, as being of the value of $260,000, as of date of March 1st, 1913.

In 1913 the taxpayer had about 44,000 acres in the tracts above referred to. (R. 35.)

During the year 1913 the taxpayer owned approximately 17,970 acres of land in Douglas County, Nevada, including the 11,187 acres here in question. All the 17,970 acres were assessed for state, school and county taxes levied in that year, without any segregation of land into classes, on the basis of a value of approximately $1.44 an acre. On January 1, 1923, when William D. Park, assessor at the time of the hearing in this case, came into office, all this land was assessed, still without any segregation into classes, at $1.25 per acre. The first segregation was made in that year, when mountain land was classified at $1.25 or $2 and grazing land at $8, $5 and $3, depending upon its quality. No segregation of lake front property in Douglas County was made until 1926, 1927, or 1928, when such land along the lake became more valuable and was selling at good prices. Park was assisted in his classifications of land by Charles Fulstone, Land Commissioner of the Nevada Tax Commission, the same person who purchased several parcels of Lake Tahoe land from the taxpayer, including the parcel called "Skyland." (R. 35.)

For the years 1920 and 1921 the taxpayer filed with the assessor of Douglas County written declarations as to the value of its real property in that County, declaring it without classification at $1.25 per acre. In each instance the assessor raised

the valuation to $2 per acre. (R. 35–36, Exhibits "F" and "G".)

Frank Murphy was vice-president of the taxpayer corporation from 1926 to 1939. From 1928 on, after W. S. Bliss and certain members of his family withdrew from the corporation, there remained outstanding only 358 shares of the corporation's stock. Murphy owned five of these shares and during 1935 and 1936 he had proxies to 219.3 and 263.3 more shares, respectively. (R. 36.)

During 1935, Frank Murphy offered to the United States Forestry Service, all the backlands owned by the company in Douglas County, Nevada, including the backlands of the acreage here in question, for $3 per acre, and all of the company's shore land in that County, exclusive of Zephr Cove, for $10 per acre. At the same time he offered to the Forestry Service 2,240 acres of backlands owned by the company in California, south of the lake, for $3 per acre. After having all these lands checked by its appraisers, the Forestry Service concluded that the California lands offered were more valuable than the backlands in Douglas County, Nevada, and in 1938 it bought the California lands for $3 per acre. (R. 36.)

SUMMARY OF ARGUMENT

The taxpayer sold 11,187 acres of land in 1938 which it had acquired long prior to March 1, 1913. In order to determine the amount of gain upon the sale for federal income tax purposes it is necessary to determine the fair market value of the land as of March 1, 1913. The controversy concerning this value was submitted to the Board of Tax Appeals and the Board, upon all of the evidence before it, found the value as of the basic date to be $75,000.

The value of the lands involved as of the basic date is a question of fact to be determined from the evidence. It is a conclusion which the Board is permitted to draw from the evidence and its finding cannot be set aside on appeal if supported by substantial evidence, even though the reviewing court would have drawn a different conclusion.

In this case the finding of value made is amply supported by the evidence and its decision should be affirmed.

ARGUMENT

The finding of the Board of Tax Appeals that the land sold by the taxpayer in 1938 had a value on March 1, 1913, of $75,000 is supported by the evidence

In 1938 the taxpayer sold 11,187 acres of land, with improvements, for a total consideration of $300,433.27. In reporting its gain from this sale in its 1938 income tax return the taxpayer used a cost or other basis of $185,442.25, which included $30,428.25 as cost of improvements. (R. 26.) Neither the amount of the consideration received nor the cost of improvements is in controversy. This leaves in issue only the cost or other basis of the land sold by the taxpayer which should be used in computing the gain on the sale.

The land sold by the taxpayer in 1938 was acquired long prior to March 1, 1913, and under Section 113 (a) (14) of the Revenue Act of 1938, *supra,* the basis for computing the gain or loss under that Act upon the sale in question is the cost of the property, adjusted in accordance with subsection (b) of that section, or the fair market value of the property on March 1, 1913, whichever is higher. There is no contention that the adjusted cost of the property was higher, so the fair market value of the land in question on March 1, 1913, is the proper basis for computing the taxpayer's gain or loss upon the sale in 1938.

In reporting its gain from the sale the taxpayer used $155,014 as the fair market value on March 1, 1913, of the lands involved. (R. 26.) As just stated, the Commissioner reduced this value by $15,501.85, or to $139,512.15 (R. 13–15, 26), in determining the deficiency from which the taxpayer appealed. In its petition to the Board of Tax Appeals the taxpayer alleged that the March 1, 1913, value of the land sold was $192,217.36. (R. 9–10.) In his amended answer the Commissioner alleged that the fair market value was not in excess of $60,000. (R. 21.) The Board found, on the evidence, that the fair market value of the land in question on March 1, 1913, was $75,000. (R. 36.)

The taxpayer admits that the question of value is a question of fact and that on appeal the jurisdiction of the Circuit Court

of Appeals is limited to a determination whether the Board's finding is supported by the evidence. (Br. 11–12.) The substance of its contention in this case is that the Board's finding of value is not supported by any evidence and must therefore be reversed and at the outset it cites a number of decisions in which it says the decision of the Board was reversed because its finding of value was not supported by substantial evidence. (Br. 12–13.)

It is not contended by the Commissioner that the Circuit Courts of Appeals have not, or cannot, reverse a decision of the Board when its finding of value is not supported by the evidence. We submit, however, that this is not a case in which a reversal of the Board can be justified on this ground. For that reason, it is not necessary to examine in detail the several cases cited by the taxpayer to determine whether the reversal was justified under the circumstances of the particular case. It might be noted, however, that in *Helvering* v. *Rankin*, 295 U. S. 123, cited by the taxpayer (Br. 12), the Supreme Court reversed the decision of the Circuit Court of Appeals for the Third Circuit because that court had refused to approve a finding of value made by the Board of Tax Appeals. More recently the Supreme Court has made it even clearer that review by the Circuit Courts of Appeals of findings of fact by the Board must be limited to determining whether the findings are supported by the evidence. See *Palmer* v. *Commissioner*, 302 U. S. 63, 70; *Helvering* v. *Nat. Grocery Co.*, 304 U. S. 282, 291; *Colorado Bank* v. *Commissioner*, 305 U. S. 23, 27; *Helvering* v. *Kehoe*, 309 U. S. 277–279.

In *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37, the Circuit Court of Appeals for the Seventh Circuit had rejected the Board's finding of value. The Supreme Court, in reversing the decision of the Circuit Court, said (*id.*, p. 40):

> This action, we think, amounted to an unwarranted substitution of the Court's judgment concerning facts for that of the Board. There was substantial evidence, as appears above, to support the latter's conclusion, and in such circumstances this must be accepted. It is the function of the Board to weigh the evidence and declare

> the result. We undertook to state the applicable rule in *Helvering* v. *Rankin,* 295 U. S. 123, 131, and *General Utilities & Operating Co.* v. *Helvering,* 296 U. S. 200, 206.

In *Palmer* v. *Commissioner, supra,* where the Circuit Court of Appeals for the First Circuit had rejected certain findings of value made by the Board, the Supreme Court said (*id.*, p. 70):

> The findings are inferences which the board was free to draw from all the facts and circumstances disclosed by the record. Such a determination of fact is not to be set aside by a court *even if upon examination of the evidence it might draw a different inference.* * * * [Italics supplied.]

In *Helvering* v. *Kehoe, supra,* where the Circuit Court of Appeals for the Third Circuit had based its decision upon its review of the evidence rather than upon the Board's findings, the Supreme Court said (*id.*, p. 279):

> Under the rule often announced. the function of the Board of Tax Appeals is to weigh the evidence and declare the result as to matters properly before it. Upon review the court may not substitute its judgment of the facts for that of the Board. When there is substantial evidence to support the conclusion of the latter this must be accepted. * * *

It should also be noted that all of the cases cited by the taxpayer (Br. 12–13) except *Andrews* v. *Commissioner,* 135 F. 2d 314 (C. C. A. 2d),[4] were decided before the decisions of the Supreme Court in the cases just cited. To the extent that any of them may have been contrary to the principles announced by the Supreme Court they no longer would be good law. Also, it might be noted that in some of the cases cited (Br. 12–13), such as *Chicago Ry. Equipment Co.* v. *Blair,* 20 F. 2d 10 (C. C. A. 7th), *Nachod & United States Signal Co.* v. *Helvering,* 74 F. 2d 164 (C. C. A. 6th), and *Belridge Oil Co.* v. *Commissioner,* 85 F. 2d 762 (C. C. A. 9th), the Board of Tax Appeals merely affirmed the Commissioner's determination on the

[4] The *Andrews* case, *supra,* is now pending before the Supreme Court on petition for a writ of certiorari filed by the taxpayer, October Term, 1943.

ground that the evidence failed to overcome its presumptive correctness, and in doing so, completely ignored positive evidence of value introduced by the taxpayer. As will be seen, that is not the situation here. Finally, it should be remembered that the decision in each case depends primarily upon the facts of that particular case.

The question of valuation for federal tax puposes, as well as for other purposes, has been the subject of an enormous amount of litigation. It is one of the most difficult and elusive questions the courts have been called upon to decide.[5] The term "fair market value" as used in the statute here involved has been variously defined by the courts. See *Chicago Ry. Equipment Co.* v. *Blair, supra;*[6] *Houghton* v. *Commissioner,* 71 F. 2d 656 (C. C. A. 2d), certiorari denied, 293 U. S. 608; *Helvering* v. *Kendrick Coal & Dock Co.,* 72 F. 2d 330 (C. C. A. 8th), certiorari denied, 294 U. S. 716; *Kitrell* v. *United States,* 79 F. 2d 259 (C. C. A. 10th), certiorari denied, 296 U. S. 643; *Commissioner* v. *Marshall,* 125 F. 2d 943 (C. C. A. 2d); *Andrews* v. *Commissioner, supra.*[7]

Despite any attempted definition, however, the real problem in any case is to determine a value based on the evidence at hand. Such a determination is at best only a conjecture. As stated in *Commissioner* v. *Marshall, supra* (p. 946), a finding of value "involves a conjecture, a guess, a prediction, a prophecy." Given one set of facts the "guess" or "prophecy" may be fairly accurate, while on another set of facts, such as the facts involved in the *Marshall* case, *supra,* where the uncertainties of the future are involved, the guess may turn out to be all wrong.[8]

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[5] For a discussion of the question as it relates to the federal tax laws, see 10 Mertens, Law of Federal Income Taxation, c. 59.

[6] For the later proceedings in this case see *Chicago Railway Equipment Co.* v. *Commissioner,* 13 B. T. A. 471, modified, 39 F. 2d 378 (C. C. A. 7th), reversed, 282 U. S. 295.

[7] See note 4, *supra.*

[8] In *Helvering* v. *Safe Deposit Co.,* 316 U. S. 56, the Supreme Court remanded a case to the Board of Tax Appeals to make a finding of value, and in doing so it said (p. 66) "In remanding this case to the Board of Tax Appeals for a determination of this issue, we recognize that a decision must necessarily be an approximation derived from the evaluation of elements not easily measured."

The taxpayer asserts that the burden of proof was upon the Commissioner in this case because he repudiated his original determination when he filed his amended answer asking for an increased deficiency. (Br. 13–14.) But regardless of any presumption which attached to the Commissioner's original determination of deficiency, it is clear from the record that the question of value here involved must be decided on the evidence. Cf. *Del Vecchio* v. *Bowers,* 296 U. S. 280.

The taxpayer also insists that the Board "made no finding and set forth no evidence which would indicate or support" the finding of $75,000 value. (Br. 14, 16.) To support this statement it is said that the Board "gives no inkling of the method or formula which it used" to reach its final result; that the value found "does not approximate" any value claimed by either party; that no witness testified to any such value; that while findings indicate the shore land to have been more valuable than the back land, yet there is nothing in the findings or opinion to indicate that the Board made any distinction in arriving at its valuation; that there is nothing in the findings or opinion to indicate that the Board "employed any method" to reach the value found; that it "would take a nebulous formula indeed to determine the value of the lands in question" from the sales listed in the findings (Br. 16–18), and that this failure "to set forth the evidence or other basis upon which it determined the value found is in itself sufficient grounds for reversal of the decision" (Br. 37). It is therefore concluded that the finding of the Board was "purely arbitrary" and is not supported by the evidence. (Br. 18, 37.)

The taxpayer devotes some space to its so-called "analysis of the evidence." (Br. 26–32.) Some of this discussion pertains to lack of evidence which might have been helpful in arriving at a more accurate valuation if the matters mentioned had been proved; the rest of it is in substance a declaration that none of the evidence in the record is evidence of the 1913 value except that evidence upon which the taxpayer relies. In other words, the value fixed by the witness Bliss and corroborated by the witness Comstock "was the only evidence before the Tax Court with regard to the March 1, 1913 value of the land in question." (Br. 35.)

We submit that every bit of evidence in the record shows that the valuation placed upon the land of the taxpayer in 1912 was not its fair market value on March 1, 1913. The Board was not required to accept Bliss' estimate, regardless of his qualifications as an expert, under all of the circumstances of the case. And certainly the weight to be given his testimony was a matter for the Board to judge.

The taxpayer says it is apparent from the Board's findings and opinion that "little or no consideration" was given to the testimony of the witness Bliss. (Br. 34.) This is error. It found as a fact that the prices named in the option agreement with Brewster, Edwards and Wooster were those which Bliss felt in 1912 would be realized over a period of five years. (R. 29.) And it is clear that his testimony was given full consideration along with all other evidence in arriving at its conclusion. But it is also clear from all of the evidence that his 1912 estimate did not represent the fair market value of the land in question at the basic date.

The valuation upon which the taxpayer relies was made in 1912, but the basis of that valuation is not clear. It clearly could not have been based on established market prices for such land because the record indicates that very little land of any description had changed hands for several years prior to 1912. It is not shown whether the estimate was based on the value of the various tracts as farm land, as grazing land, as timber land, as residential property, or for what they were valuable. It is clear that the land owned by the corporation had not for some time, and did not thereafter, produce enough income to pay the expenses of the corporation. It is also clear that other officers of the corporation, who may have been as well qualified as Mr. Bliss, thought the value he had placed on it was too high, and this difference of opinion eventually led to the latter's withdrawal from the corporation.

The agreement with Brewster, Edwards and Wooster merely granted them an option to purchase the total acreage at the rate of a specified percentage each year over a period of five years. It is clear from the provisions of the original agreement (R. 74–82), and particularly the application for a year's extension (Exhibit 9), that Brewster, Edwards and Wooster

were only interested in the matter as a speculative proposition and had no intention of purchasing the land themselves.

It is not clear from the record whether the price named in the option was based on Mr. Bliss' appraisal of the land, or whether the appraisal was made as a form of allocation of the option price after it already had been agreed upon.

In any event, subsequent events proved that the values fixed under the terms of the option agreement were far too high. This is shown by subsequent sales. (R. 100–105.)

Besides the sales, there is much other evidence that the value of the land involved was generally much lower than estimated by Mr. Bliss in 1912. The appraisals made in connection with the settlement of the estates of Duane Leroy Bliss and Elizabeth T. Bliss, the appraisals for local and state taxes, the sales to the Forestry Service, and the statements made in connection with income and capital stock tax returns of the taxpayer all are evidentiary facts bearing upon the question of value and all must be given their due weight in arriving at a conclusion. The same is true of all other facts found by the Board. *Whitlow* v. *Commissioner,* 82 F. 2d 569 (C. C. A. 8th).

All of these statements except one—that signed by S. C. Bigelow as secretary on September 16, 1926, were signed by W. S. Bliss as president of the corporation. (R. 32–35.) The taxpayer terms these statements "discredited representations." (Br. 31.) But they are convincing admissions against interest, particularly when considered in connection with all of the other evidence.

The taxpayer is therefore in error in asserting that if the testimony of Mr. Bliss and Mr. Comstock are disregarded there is then "no evidence whatsoever in the entire record" upon which a finding of value can be made. (Br. 36.)

Furthermore, the Board was entitled to take into consideration all evidence relating to subsequent events in order to determine the 1913 value of the land in question. See *Doric Apartment Co.* v. *Commissioner,* 94 F. 2d 895 (C. C. A. 6th), and cases cited. In fact, all evidence bearing upon the value of the land at the basic date is admissible. *Whitlow* v. *Commissioner, supra.* It is the duty of the Board to weigh that evidence and announce its conclusion.

The taxpayer calls the finding of the Board arbitrary, presumably in that it made a lump sum finding that the value was $75,000 for all of the land sold without endeavoring to find the value on the basis of separate tracts. However, the price named in the 1912 option for all of the land then owned was a lump sum, and the price paid for the land here involved was a lump sum. There can be no reason why a finding of value in round figures, particularly in a case like this, would not be just as accurate as a finding based on a separate valuation of individual tracts.

The Board's finding of value in this case represents its best estimate of the March 1, 1913, value of the property involved, based on all of the facts before it. Another court might conclude from the same evidence that the value was more or less. The taxpayer says a value of $25,000 or $200,000 would find as much support in the evidence as the finding of $75,000. (Br. 17.) This statement is a little extreme, but at most a finding of value can only be the evaluation of all of the evidence by the trial court, and there well might be an honest disagreement among courts as to the true value which the evidence establishes. However, as the Supreme Court said in *Palmer* v. *Commissioner, supra*, such finding is an inference which the Board was free to draw from all of the facts and circumstances disclosed by the record and such a finding by the Board is not set aside, even if upon examination of the evidence the reviewing court might draw a different inference.

The argument (Br. 38–40) that the Board of Tax Appeals erred in determining a greater deficiency than that set forth in the deficiency notice is without merit. The sufficiency of his claim for an increased deficiency (R. 17–22) cannot be questioned. See *Helvering* v. *Edison Securities Corp.*, 78 F. 2d 85 (C. C. A. 4th); *Commissioner* v. *Ray*, 88 F. 2d 891 (C. C. A. 7th), certiorari denied, 301 U. S. 711. The substance of the argument is that the Commissioner failed to bear the burden of proving that the March 1, 1913, value of the land in question was less than that used in the deficiency notice. But, as has already been pointed out, the Board made its finding on the basis of all of the evidence and its finding

should stand. Neither is there any merit to the argument (Br. 40–44) that since the Commissioner, by affirmative plea, alleged that the March 1, 1913, value of the land in question was not in excess of $60,000 he abandoned his original determination and now the Board is without authority to redetermine any deficiency. The Board's jurisdiction was invoked to redetermine the deficiency originally determined by the Commissioner. By proper pleading the parties put into issue the question of the March 1, 1913, value of the land sold by the taxpayer in 1938; the issue was submitted on the proofs, and the Board has fulfilled its function by determining the issue in controversy.

CONCLUSION

The decision of the Board of Tax Appeals is right. It is supported by the facts and the law and should be affirmed.

Respectfully submitted.

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